IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

KROBLIN REFRIGERATED XPRESS, INC.

and

SCHANNO TRANSPORTATION, INC.
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 2, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been printed in the permanent reports and a copy of it has been appended to this position in the Appendix at pp. 3a to 9a. The report of the Interstate Commerce Commission, which the judgment of the Court of Appeals for the District of Columbia Circuit affirmed in all respects, is reported at 123 M.C.C. 831 and is printed in the Appendix at pp. 10a to 30a.

JURISDICTION

The judgment of the Court of Appeals, printed in the Appendix, was entered on June 2, 1977. The Court of Appeals stayed its mandate for 21 days on July 5, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

Are motor common carriers operating pursuant to regulation by the Interstate Commerce Commission under Part II of the Interstate Commerce Act (49 U.S.C. 301-327), obligated to favor freight forwarders operating pursuant to regulation by the Interstate Commerce Commission under Part IV of the Interstate Commerce Act (49 U.S.C. 1001-1022) with long-haul transportation service at rates low enough to enable the forwarders to make a profit?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The National Transportation Policy, Act of September 18, 1940, ch. 722, tit. I, § 1, 54 Stat. 899, and the pertinent portions of the Interstate Commerce Act §§ 306 (a)(1), 307(a), 1002(a)(5), 1010(a)(1), and 1010(c), are set forth in the Appendix at pp. 1a, 2a.

STATEMENT

The suit below arose from the grant by the Interstate Commerce Commission, over the opposition of this petitioner, of the applications of two motor carriers for certificates of public convenience and necessity authorizing them to transport general commodities, with certain exceptions, (1 from Boston, Mass., Newark, N.J., New York, N.Y., and Philadelphia, Pa., to Kansas City, Mo., Dallas and Houston, Tex., and New Orleans, La.; and (2) from Springfield, Mass. to Kansas City, Mo., and Dallas and Houston, Tex., restricted to shipments originating at or destined to the facilities of ABC Freight Forwarding Corp., Midland Forwarding Corp., and National Carloading Corp., and further restricted to shipments moving on bills of lading issued by the named freight forwarders. The basic facts are not in dispute. They are as follows:

1. The applications before the Commission were supported only by the freight forwarders named above.

2. Freight forwarders regulated under Part IV of the Interstate Commerce Act constitute a mode of transportation which may not lawfully provide its own line-haul transportation but, instead, must utilize the services of common carriers regulated under Part I (rail) Part II (Motor) or Part III (Water) of that Act and must pay, for the most part, rates published in the tariffs of such carriers.

3. The principal reason for the forwarders' support of the two applications was the unwillingness of existing motor common carriers to favor the freight forwarders with freight rates low enough to enable those forwarders to move their traffic at a profit.

4. The Commission held that there is a need by the supporting forwarders for motor carriers service at rates which are both structurally suited and low enough to permit the supporting forwarders to operate at a profit.

5. The Commission also held that the failure of existing motor common carriers to provide the forwarders with such rates is tantamount to an embargo of forwarder traffic and justifies a finding that public convenience and necessity requires authorization of carriers which will provide such rates and services.

Believing that the foregoing does not constitute satisfaction of the statutory requirement that certificates authorizing new operations as motor common carriers in interstate commerce be granted only when required by the public convenience and necessity,[1] petitioner sought review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals affirmed the Commission's decision upon a ground not advanced by the Commission itself, namely that the promptness and dependability of service offered by freight forwarders "evidently afford advantages of significant value, as judged by the marketplace." [2] The Court of Appeals went on to say that the freight forwarders in the proceedings before the Commission "are already established, and their persistent clientele testifies to the underlying public convenience and necessity in the forwarders' continued service." [3]

The Court of Appeals then held that to override the Commission's decision would go beyond the Court's duty and might even trespass on an area committed to the agency's discretion.[4]

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the Interstate

[1] 49 U.S.C. 307(a), Appendix pp. 1a and 6a.

[2] Appendix, p. 7a.

[3] Appendix, p. 7a.

[4] Appendix, p. 7a.

Commerce Act as requiring the carriers subject to the provisions of Part II thereof to maintain special rates for the carriers subject to Part IV thereof which are low enough to enable the latter carriers to make a profit.

At the outset of its discussion of the decision of the Commission under review, the Court of Appeals said:

> "The ICC premised its decision on the ground that the need of freight forwarders to obtain long-haul rates low enough to allow the forwarders a reasonable profit was a proper consideration in determining public convenience and necessity." [5]

The Court ended its own opinion with the statement that it is in agreement with the conclusions of law stated by the three-judge court in *Alterman Transport Lines, Inc.* v. *United States*, 361 F.Supp. 664 (M.D. Fla. 1973). In that case, the three-judge court had before it the decision of the Commission in *Armellini Express Lines, Inc., Extension—Freight Forwarder Traffic*, 113 M.C.C. 603 (1971), in which the Commission had for the first time proclaimed the doctrine that freight forwarders are *per se* entitled to motor carrier line-haul service at rates low enough to enable them to operate at a profit in competition with other motor carriers. The review of that decision by the three-judge court in *Alterman Transport, supra*, entered upon the significance of rates in any public convenience and necessity case and the possibility of an embargo being effectuated by rates which are too high to permit movement of traffic. The three-judge court sustained the Commission's decision and dismissed the complaint against it. The judgment was not appealed.

Following its decision in *Armellini, supra*, the Interstate Commerce Commission has granted at least twelve certificates of public convenience and necessity authorizing new motor carrier operations for the transportation

[5] Appendix, p. 5a.

of freight forwarder traffic. A list of those cases which may not be complete, has been attached hereto at page 32a of the Appendix. In each of those cases, the Commission's finding of public convenience and necessity was, in the words of the Court of Appeals in the decision below, "premised ** on the ground that the need of freight forwarders to obtain long-haul rates low enough to allow the forwarders a reasonable profit was a proper consideration in determining public convenience and necessity."

If the Supreme Court does not issue the writ here sought and does not review the decision of the Court of Appeals, there will be serious erosion of the adequacy and economy of regulated motor carrier service for the public at large. The evidence in the case before the Commission shows clearly that motor carriers encounter the competition of freight forwarders only at the more advantageous traffic centers and only for the most desirable traffic. Service to the less populous places and the rural communities is provided by the motor common carrier industry but not by the freight forwarders. To the extent, then, that the more desirable and more profitable traffic is diverted from the motor carriers to the forwarders, the ability of the former to continue service at the less attractive points is impaired. The very concept of requiring one competitive mode to maintain low rates solely for the benefit of another, necessarily reduces the ability of the first mode to maintain its services for the public at large on an economical and efficient basis. A part of its capability has been expanded to shore up the operations of its competitor.

A portion of the opinion of the Court below,[6] consists of an attempt to interpret the decision of the Commission as going beyond what the Court had earlier characterized as the premise of the decision. The Court said that "the

[6] Appendix, p. 8a.

Commission paid careful attention to the inadequacy of service currently available to shippers over the routes applied for."[7] But what the Commission was talking about in the considered portion of its report was the adequacy of existing service for the transportation of forwarder traffic at rates of a nature and level that the forwarders, as shippers, could afford. There was no evidence in the case of any need of any sort on the part of any shipper other than a forwarder.

The effort of the Court of Appeals to sustain the Commission's decision on grounds not articulated by the Commission itself is squarely contrary to the holding of this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943). More importantly, the entire concept of the opinion below is irreconcilable with the decision of this Court in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), in which it was emphasized that the National Transportation Policy is the yardstick by which the correctness of the Commission's decisions is to be judged. In that case, an application for motor carrier operating authority was denied because existing rail service was found reasonably adequate. This Court held that the public is entitled to service by both modes, with the benefit of lower rates by one if that mode has the economic ability to provide them. In the case below, the Court of Appeals has ignored that salutary principle and has held in effect that the motor carrier mode must maintain special rates for forwarder traffic merely because the forwarders exist and are being used by the public. The decision of the Court of Appeals is the antithesis of this Court's decision in *Schaffer Transportation, supra.*

The question presented by this case is of great and recurring significance in the administration of the Interstate Commerce Act. It involves a serious question of

[7] Appendix, p. 8a.

administrative policy in the regulation of the separate modes of transport subject to the Interstate Commerce Act. The effect of the decision below, if unreversed, upon realization of the goal of regulation as expressed in the National Transportation Policy make this case an especially appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

HOMER S. CARPENTER

KEITH G. O'BRIEN

APPENDIX

APPENDIX

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, July 12, 1960, October 15, 1962.*] [*49 U. S. C. § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

SEC. 207. [*August 9, 1935.*] [*49 U. S. C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *

SEC. 402. [*May 16, 1942, amended, Dec. 20, 1950.*] [*49 U. S. C. § 1002.*] (a) For the purposes of this part—

* * * *

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and con-

solidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

SEC. 410. [*May 16, 1942, August 28, 1957, July 12, 1960.*] [*49 U. S. C. § 1010.*] (a) (1) No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service;

* * * *

(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. No such permit shall be issued to any common carrier subject to part I, II, or III of this Act; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III of this Act, shall be denied because of the relationship between such corporation and such common carrier.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1452

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KROBLIN REFRIGERATED XPRESS, INC.
SCHANNO TRANSPORTATION, INC., INTERVENORS

Petition for Review of an Order of the Interstate Commerce Commission

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Argued April 21, 1977

Decided June 2, 1977

Homer S. Carpenter, with whom *R. Edwin Brady* and *Richard R. Sigmon* were on the brief, for petitioner.

Walter H. Walker, III, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, *Charles H. White, Jr.*, Associate General Counsel, Interstate Commerce Commission, and *Lloyd John Osborn*, Attorney, Department of Justice, were on the brief, for respondents.

Anthony C. Vance for intervenor, Schanno Transportation, Inc.

Thomas R. Kingsley was on the brief for intervenor, Kroblin Refrigerated Xpress, Inc.

Before MCGOWAN, MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: In April of 1973, Kroblin Refrigerated Xpress, Inc. of Waterloo, Iowa, and Schanno Transportation, Inc. of West St. Paul, Minnesota, petitioned the ICC for certificates of public convenience and necessity for carriage over "irregular routes of general commodities, with the usual exceptions . . . (1) from Boston, Mass., Newark, N.J., New York, N.Y., and Philadelphia, Pa., to Kansas City, Mo., Dallas and Houston, Tex., and New Orleans, La.; and (2) from Springfield, Mass., to Kansas City, Mo., and Dallas and Houston, Tex. . . ." (J.A. 8). The petitions alleged that there was an inadequacy of service between those locations as provided by currently licensed carriers and by the railroads. The principal inadequacy was felt by freight forwarders, who supported the two long-haul carriers' applications.

Freight forwarders operate as common-carriers, and hold themselves out to the public as able to provide long-haul service. In actuality, however, their function is limited to collecting small shipments and consolidating them into what were called car-load lots in railroad parlance, applicable now to the trucking industry.

The administrative law judge found that the freight forwarders' concern was an inadequate basis for finding that the required convenience and necessity existed for granting the applicant carriers the operating certificates

requested. The ICC reversed that decision on October 30, 1975, and granted both applications. 123 M.C.C. 831 (1975). Competing long-haul carriers have taken this appeal.

The ICC premised its decision on the ground that the need of freight forwarders to obtain long-haul rates low enough to allow the forwarders a reasonable profit was a proper consideration in determining public convenience and necessity. The Commission relied on its decision in *Armellini Express Lines, Inc. Extension—Freight Forwarder Traffic*, 113 M.C.C. 603 (1971), *aff'd sub nom. Alterman Transport Lines, Inc. v. United States*, 361 F. Supp. 664 (M.D. Fla. 1973) (three-judge court). That decision held that freight forwarders could support an application for a motor carrier certificate by long-haul shippers. If the rate structure by existing carriers was so unsuitable that the freight forwarder could not obtain a return on investment sufficient to stay in business, that was held to constitute adequate proof of the necessity to authorize carriers who were willing to provide such service at lower rates and that the public convenience would be served by granting such operating authority. The problem involves a combination of service and suitable rates. In *Armellini*, and in the present case, the freight forwarders sought a special type of rate, the "freight-all-kinds" or "FAK" rate. The existing motor carriers were willing to offer some of the service needed at higher rates set by type of commodity; but the freight forwarders were interested in avoiding the cost of separating out types of goods being snipped (with some exceptions) and desired a lower FAK rate. Kroblin and Schanno were willing to offer the suitable rates that the forwarders considered they needed whereas protestants were not.

The challenge brought against this rationale is based on the difference between freight forwarders, shippers, and common carriers. The Commission held, "suffice it

to say that freight forwarders are recognized as common carriers by the act." 123 M.C.C. at 839. Petitioners emphasize that whereas common carriers must demonstrate a "public convenience and necessity" for their service, 49 U.S.C. § 307(a),[1] freight forwarders need only show that their service is "consistent with the public interest," 49 U.S.C. § 1010(c)[2] and with the national transportation policy declared in the act.[3] Nor, in petitioners' view, are

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[1] Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

49 U.S.C. § 307(a) (1970).

[2] The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. No such permit shall be issued to any common carrier subject to chapters 1, 8, or 12 of this title; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to chapters 1, 8, or 12 of this title, shall be denied because of the relationship between such corporation and such common carrier.

49 U.S.C. § 1010(c) (1970).

[3] "NATIONAL TRANSPORTATION POLICY

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this

freight forwarders equivalent to underlying shippers; their service is simply to consolidate and schedule long-haul shipments provided by other persons.

Although petitioners' disparagement of the service provided by freight forwarders in the post-rail transportation world has some validity, the fact remains that many shippers choose to deal with freight forwarders rather than to deal directly with long-haul carriers. The promptness and dependability of service offered by the freight forwarders evidently afford advantages of significant value, as judged by the marketplace. The case before us does not involve hypothetical freight forwarders attempting to prove, as a theoretic matter, the usefulness of their service. Rather, the freight forwarders concerned here are already established, and their persistent clientele testifies to the underlying public convenience and necessity in the forwarders' continued service. To override the Commission's decision holding that this service is consistent with the public interest, convenience and necessity in the light of such market experience would certainly go far beyond this Court's duty to inspect for substantial evidence, and might even trespass on an area

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Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Act of Sept. 18, 1940, ch. 722, tit. I, § 1, 54 Stat. 899.

committed to the agency's discretion. 5 U.S.C. §§ 701 (a) (2), 706(2) (E) (1970).

However, we do not have to decide whether freight forwarders' support (when their services are being widely used at competitive rates) will alone suffice to uphold a carrier's application for certificate authority, because in this case the Commission paid careful attention to the inadequacy of service currently available to shippers over the routes applied for. The Commission also found, with substantial evidence, that "the protestants [petitioners here] have refused to make any meaningful effort to negotiate suitable FAK rates with the supporting forwarders and have, thereby, demonstrated their lack of interest in the involved traffic." (123 M.C.C. at 842; J.A. 12). The pattern of conduct by the protesting carriers is again quite similar to that found in *Armellini*. *Cf.* 361 F. Supp. at 669. And even if there were no actual intent to boycott, technical deficiencies in the existing carriers' authority prevent them from providing the service to freight forwarders proposed by Kroblin and Schanno:

> Rail TOFC [trailer-on-flat-car] service has been demonstrated to be slow and erratic, and we disagree with the Administrative Law Judge that transit times of 5 to 11 days are adequate . . . . Joint-line motor carrier service is likewise slow and erratic, and it is significant that no rail carrier and only three motor common carriers oppose the application. As to the protestants, (a) none serves New Orleans, (b) none has solicited or handled any of the supporting forwarders traffic, and (c) none indicated except in the most general terms, the nature, frequency, and quality of service it would provide.

(123 M.C.C. at 843; J.A. 13).

There being substantial evidence in support of the findings of fact of the Interstate Commerce Commission (123 M.C.C. 831), based on the *entire* record, *Universal Cam-*

era Corp. v. NLRB, 340 U.S. 474 (1951), and this court agreeing with the conclusions of law stated by the three-judge court in *Alterman Transport Lines, Inc. v. United States, supra*, concerning the position of freight forwarders in the national transportation scheme,[4] the Commission's decision is in all respects affirmed.

So ordered.

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[4] Surely [freight forwarders] . . . must be allowed to testify in support of applications for motor authority since motor carriage is one form of transportation that they must depend upon to move the freight of individual shippers tendered to them. *See, e.g.*, Central Forwarding Inc., Ext.—Household Goods, 107 M.C.C. 706, 714 (1968), modified on other grounds, 110 M.C.C. 20; Dobbert Common Carrier Application, 73 M.C.C. 711 (1957).

361 F. Supp. at 667.

M-12724 Served November 6, 1975

INTERSTATE COMMERCE COMMISSION

No. MC-30844 (SUB-NO. 462)[1]

KROBLIN REFRIGERATED XPRESS, INC., EXTENSION—
FREIGHT FORWARDERS TRAFFIC

Decided October 30, 1975

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1. In No. MC-30844 (Sub-No. 462), public convenience and necessity found shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities, with the usual exceptions and except foodstuffs, (1) from Boston, Mass., Newark, N.J., New York, N.Y., and Philadelphia, Pa., to Kansas City, Mo., Dallas and Houston, Tex., and New Orleans, La.; and (2) from Springfield, Mass., to Kansas City, Mo., Dallas and Houston, Tex., subject to certain restrictions.

2. In No. MC-134477 (Sub-No. 30) public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities, as described above from the same origins to the same destinations and subject to the same restrictions as those mentioned in (1) above. Upon compliance by applicants with certain conditions, issuance of certificates approved.

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[1] This report also embraces No. MC-134477 (Sub-No. 30) Schanno Transportation, Inc., Extension—Freight Forwarder Traffic.

Truman A. Stockton, Jr., and *Anthony C. Vance* for applicants.

Mark Andrews, Edward Bazelon, Arnold Burke, and *Wentworth Griffin* for protestants.

R. Edwin Brady, Homer S. Carpenter, Keith G. O'Brien, and *Richard R. Sigmon* for the Regular Common Carrier Conference of the American Trucking Associations, Inc.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY,
GRESHAM, AND CLAPP

GRESHAM, *Commissioner*:

These proceedings involve related issues, were heard on a consolidated record, and were the subject of a single initial decision and recommended order of the Administrative Law Judge. Exceptions to the initial decision of the Administrative Law Judge were filed by applicants, and protestants and intervener in opposition to the application replied. Our conclusions differ from those recommended.

In No. MC-30844 (Sub-No. 462) and No. MC-134477 (Sub-No. 30) by applications filed, respectively, April 20, 1973, as amended, and April 27, 1973, as amended, Kroblin Refrigerated Xpress, Inc., of Waterloo, Iowa, and Schanno Transportation, Inc., of West St. Paul, Minn., seek certificates of public convenience and necessity authorizing operation, in interstate or foreign commerce, as common carriers by motor vehicle, over irregular routes of general commodities, with the usual exceptions and except foodstuffs, fresh or frozen, (1) from Boston, Mass., Newark, N.J., New York, N.Y., and Philadelphia, Pa., to Kansas City, Mo., Dallas and Houston, Tex., and New Orleans, La.; and (2) from Springfield, Mass., to Kansas City, Mo., and Dallas and

Houston, Tex., restricted to shipments originating at or destined to the terminals and other facilities of ABC Freight Forwarders Corp., Midland Forwarding Corp., and National Carloading Corp., and further restricted to shipments moving on bills of lading of the said named freight forwarders. Both applications are opposed by protestants T.I.M.E.-DC and Consolidated Freightways Corporation of Delaware. Transcon Lines and Regular Common Carrier Conference of the American Trucking Associations, Inc., which was permitted to intervene at the hearing, oppose the Schanno application.

The Administrative Law Judge recommended that the applications be denied, for the reasons that the supporting freight forwarders failed to demonstrate (a) good faith in their attempts to negotiate suitable "freight-all-kinds" (FAK) rates with existing motor common carriers of general freight, (b) that existing trailer-on-flatcar (TOFC) service which they now use, is deficient, and (c) that applicants' proposed operations are economically or operationally feasible. In the course of his opinion the Administrative Law Judge criticized and, in effect, declined to follow the principals set forth in *Armellini Express Lines, Inc., Ext.—F. F. Traffic,* 113 M.C.C. 603 (1971), affirmed *sub nom. Alterman Transport* v. *U.S.*, 361 F.Supp. 664 (M.D. Fla., 1973). In his view, that decision, insofar as it sanctions "cutrate" motor carrier service to freight forwarders unable to obtain sufficiently low rates from existing motor common carriers of general freight, confers an undue competitive advantage upon the former, fails to recognize the severe rate and service limitations and obligations governing the operations of the latter, and, in general represents a policy which can only lead to the further deterioration of general commodities less-than-truckload (LTL) service.

In their exceptions applicants urge (1) that the policies enunciated in *Armellini, supra* and *Sullivan Lines, Inc., Extension—Far West,* 118 M.C.C. 801 (1973), govern the

instant proceedings and require a grant of the authority requested; (2) that in their unsuccessful attempts to obtain suitable FAK rates, it was the protestants and not the forwarders who are guilty of bad faith; (3) that in their adamant refusal to alter their existing rate structure, protestants are motivated not by any concern for specific traffic, but by a general desire to drive freight forwarders out of the domestic LTL freight business; (4) that contrary to the findings of the Administrative Law Judge, existing TOFC service is clearly unsatisfactory, and, in any event, no railroads protested the applications; and (5) that the Administrative Law Judge's finding that applicants failed to demonstrate their cost capability of performing the operations is neither true nor relevant. Protestants and intervener generally support the findings and conclusions of the Administrative Law Judge.

The evidence, the Administrative Law Judge's recommendations, the exceptions, and the replies have been considered. We find the Administrative Law Judge's statement of facts to be correct in all material respects; and, as modified or supplemented herein, we adopt such statement as our own. The pertinent facts will be restated to the extent necessary for clarity of discussion.

APPLICANTS

Applicants are irregular route, motor common carriers of specified commodities, principally foodstuffs, meat, and packinghouse products. Kroblin, as pertinent, holds authority between points in Texas, Kansas, and Missouri, on the one hand, and, on the other, points on the east coast, as well as limited authority from specified Louisiana points to points in certain Midwestern States. Systemwide it operates numerous units of suitable equipment and operates terminals at Brockton, Mass., and North Bergen, N.J., from which the involved origins would be served. It submitted no traffic, deadhead mile-

age, or cost studies but stated that during October 1973, it terminated 95 trailers in Massachusetts, 75 in New York, 62 in New Jersey, 15 in Pennsylvania, 34 in Maryland, 11 in Rhode Island, and 43 in Connecticut, and estimates that on a weekly basis 85 units terminate between Boston and the District of Columbia. How much of this equipment would be available for the supporting forwarders use is not specified; however, an unstated portion is now returned to the Midwest and Southwest under applicant's existing authority, and the balance trip leased or utilized in the transportation of exempt commodities. In some instances, equipment is deadheaded to points as far west as Ohio before a return load is obtained and applicant's deadhead factor is said to be 15 percent of loaded miles.

Schanno's principal terminal is at St. Paul, Minn., and it conducts operations between midwestern points in Minnesota, Iowa, North Dakota, and South Dakota, on the one hand, and, on the other hand, the east coast. Since the date of the hearing, it has received authority to transport various foodstuffs, from Boise, Idaho, and Mankato, Kans., to east coast points. Additionally, in Nos. MC-134477 (Sub-No. 45) and (Sub-No. 70) filed November 29, 1973, and June 6, 1974, respectively, applicant is seeking authority to transport meats and packinghouse products, from the plantsites and facilities of American Beef Packers, Inc., at or near Cactus, Tex., and Amarillo, Tex., to east coast points.

Schanno operates numerous units of suitable equipment systemwide, and to demonstrate its ability to perform the proposed operation, introduced an exhibit depicting for a 3-week period in October 1973, 125 eastbound truckloads which moved from a variety of Minnesota, Iowa, North Dakota, South Dakota points to east coast points in the vicinity of the involved origins.[2] On

[2] Applicant admitted several of the trips involved multiple stops for delivery and that the destinations indicated might not have been the final destinations.

return, 60 units were trip leased to carriers serving the supporting forwarders in the movement of east coast traffic to St. Paul,[3] 56 were trip leased to other carriers, 5 were utilized for exempt traffic, and 4 were deadheaded. The exhibit also indicates that deadhead mileage (computed by adding up all return empty miles from the outbound destination points to applicant's home base, St. Paul) averaged 130.8 miles. At 50 cents a mile, deadhead cost on a typical return load totals $65.40. Applicant states that if the 60 vehicles used in the service of the supporting freight forwarders are excluded, 80 percent of the remaining 65, or 52 vehicles, would have been available for the proposed operation, and, in its exceptions, submits an analysis of the exhibit which indicates that the deadhead mileage associated with said 52 vehicles averaged 257 miles a load, and that mileage savings, based upon the utilization of such vehicles from the nearest origins, would average 142 miles a load, and, in fact, would be even greater if certain specific vehicles were excluded from consideration because other equipment would be available.

Applicants here propose a terminal-to-terminal operation involving the over-the-road transportation of trailers loaded and unloaded by the supporting forwarders. Schanno will send in drivers with empty trailers to the forwarders' terminals, and pick up loaded trailers. It has a constant flow of refrigerated equipment to the involved eastern origins and it maintains a 24-hour, 7-day road dispatch operation with WATS facilities to insure vehicle control. Based on an average speed of 38 miles per hour, its running time is estimated to be 2 and 3 days depending upon the mileage involved and using two men driving teams. Although, the precise level of rates that applicants will charge has not yet been determined, and is not

[3] Since the close of the hearing, applicant has obtained permanent authority to perform the transportation represented by these shipments.

of record, the supporting forwarders have indicated that they are willing to pay charges which exceed prevailing TOFC rates, "possibly by as much as 20 percent." Between New York and Dallas, and Boston and Kansas City, short-line mileages obtained from the Household Goods Carriers Bureau Guide No. 10, are 1,552 and 1,391 miles, respectively, and the prevailing TOFC rates are $677 and $660, respectively. Based on a "fully distributed" cost per mile of 49.67 cents (obtained from applicants 1972 income statement by dividing total operating expenses by total intercity miles) charges of $813 and $792, respectively (20 percent above TOFC charges), would yield Schanno profits of $42 and $101, respectively, for the example given.[4] If lower "out-of-pocket" costs are used profits will be even greater. Schanno's cost capability of providing a service is further demonstrated by its present participation in the involved traffic on a trip-lease basis under which it receives 75 to 95 percent of the revenue.

Both applications are supported by three commonly controlled freight forwarders: National Carloading, ABC Freight Forwarding Corp., and Midland Forwarding Corp. Each forwarder is a common carrier under part IV of the act engaged in the assembly and consolidation for shipment, transportation, break bulk, and delivery of LTL general commodity shipments from and to the points here involved.

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[4] Based on the same operating costs but slightly higher mileages of 1,600 miles between New York and Dallas and 1,450 between Boston and Kansas City, and a lower prevailing TOFC rate of $600 between the first two named points, the Administrative Law Judge concluded that "even at its 1972 level of operating costs," Schanno will not appear to be able to provide the required service at a charge below $800 in the case of the New York-Dallas movement and $725 in the case of the New York-New York-Kansas City movement even if it had no empty miles, that 1974 costs are higher than 1972 costs, and that, accordingly, applicants have failed to establish their ability to provide service for supporting forwarders at charges they are now paying for TOFC service. As will be discussed later in this report, we see no necessity to resolve this conflict.

Reproduced in the appendix hereto is a recapitulation of the supporting forwarders' traffic during 1972, the first 9 months of 1973, and their projected 1973 volume. Projected tonnage moving from and to involved points totals almost 45 million pounds. A typical load of freight exceeds 20,000 pounds, loads move daily, and the great preponderance of shipments weigh under 5,000 pounds each. Approximately 10 percent of this traffic requires protection from cold during the period between November and April. The supporting forwarders also require proper equipment, which will enable them to mix commodities requiring protection with those not requiring protection in the same vehicle. For an economical operation they also require stopoff service so that loads may be filled out at heavier traffic points. They feel that if they can get fast reliable service at rates which would enable them to operate at a profit, their existing traffic from and to the involved points would increase over 100 percent annually.

Supporting forwarders presently utilize rail service (Plan II ½ TOFC). (1) from Boston to Dallas, Houston and New Orleans; (2) from Springfield to Kansas City, Dallas and Houston; (3) from Newark to Dallas, Houston, and New Orleans; (4) from New York City to Dallas and Houston; (5) from Philadelphia to Dallas and Houston. A combination of rail and motor service is used: (1) from New York City to New Orleans; and (2) from Philadelphia to New Orleans; and joint-line motor carrier service is used from Boston, New York City, Newark, and Springfield to Kansas City. The record shows that none of the protestants' services are used. The supporting forwarders are dissatisfied with the existing rail service for a number of reasons: (1) transit times are slow and erratic, average 6.3 days from and to the involved points, and, when bulk is broken over St. Louis and Chicago are considerably longer, often over 10 days; (2) under Plan II ½ TOFC, the only economically feasible form, the supporting forwarders must provide transportation to and

from the ramp; (3) because of inconvenient rail deadlines for accepting freight, trailers must often be returned or retained at the railhead, exposing shipments to damage, pilferage, and delay; (4) unsecured rail yards, and practices such as "car humping" (a method for decoupling railcars), result in a higher damage and pilferage rate than motor carrier service; (5) the railroads are experiencing an "acute" shortage of TOFC trailers, and (6) protective service can only be obtained at premium cost. However, in 12 of the 33 separate movements depicted in shippers exhibit No. 10, the forwarders neglected promptly to pick up the laden trailer at destination when notified that it was available. The above-cited deficiencies also apply to joint rail-motor service. Moreover, interchange delays are frequently encountered and existing carriers chronically have been unable to supply equipment when needed.

The principal reason for supporting these applications, however, is the asserted inability of the freight forwarders to obtain from existing motor common carriers of general freight rates of a level and type that will enable them to move their traffic at a profit. Supporting forwarders charge their customers rates which are approximately equal to the LTL rates maintained by motor common carriers of general commodities. Their margin of profit is the difference between the LTL charges which they assess their shippers and the charges which they pay the motor or rail carriers for the over-the-road transportation of the aggregated shipments of LTL freight, which they handle. In addition, of course, they must absorb the handling costs at origin and destination plus their overhead. As a result it is necessary that they have access to reasonable volume line-haul rates covering aggregate LTL quantities of miscellaneous freight, commonly called freight-all-kinds or FAK rates. Moreover, the FAK rate is conducive to more efficient and expeditious service because it eliminates the necessity of rating

and classifying each commodity involved in a truckload of aggregated shipments. Although they have not yet negotiated rates with applicant, the supporting forwarders indicated that they will be willing to pay more than the prevailing TOFC charges, perhaps up to 20 percent more, for the underlying motor carrier service. If they were to employ existing motor carriers they would have to raise rates to their customers to a level at which they could not compete. In this regard, the supporting forwarders recognize that protestants have FAK rates available between three combinations of the points involved herein; however, at the present level of such rates, the supporters cannot operate a profit. For example, exhibit No. 11 indicates that if protestants' FAK rates were used, supporters would sustain a net loss of $420 on a typical movement from Newark to Dallas and a net loss of almost $339 on a typical movement from New York City to Kansas City. These line-haul rates are about twice applicable rail rates.

In their attempts to obtain suitable FAK rates the supporting forwarders have corresponded with each of the three carriers protesting these applications, and have written more than 21 letters to nonprotestants without success. Consolidated was sent two letters dated March 14 and April 30, 1973, respectively. It did not respond. T.I.M.E. was sent three letters dated March 14, April 30, and June 7, 1973, respectively. This carrier responded with two letters, the last indicating the impossibility of reducing rates at this time. Transcon was sent four letters dated March 14, April 30, September 28, and November 23, 1973, to which the carrier responded with two letters, the substance of which was to request additional information. Since this carrier, along with the other protestants, appeared in opposition to *Curtis, Inc. Extension—Acme to Denver*, infra, heard June 25 through June 28, 1973 and had received an exhibit therein, which portrayed the instantly involved tonnage, at least to Texas,

the supporting forwarders consider Transcon's request for additional information as lacking good faith.

PROTESTANTS

T.I.M.E. and Consolidated oppose both applications and Transcon opposes the Schanno application. All three are motor common carriers of general commodities operating principally over regular routes. T.I.M.E., as pertinent, is authorized to provide service on a direct-line basis to all points except Houston and New Orleans. It is one of the Nation's largest carriers with terminals throughout its system and it operates about 350 refrigerated trailers. Approximately 60 percent of protestant's total revenue comes from the transportation of LTL freight (shipments weighing under 10,000 pounds). Consolidated is also a substantial nationwide motor common carrier of general freight. As pertinent, it opposes the applications insofar as authority to serve Kansas City, Dallas, and Houston is sought. Consolidated believes that if the applications are granted, 140 million pounds of traffic could be diverted from it annually. Transcon, also a general commodity carrier, serves all points involved except New Orleans, and it too fears a diversion of existing traffic to freight forwarders. Generally, protestants take the position that they are in competition with the forwarders for available LTL traffic; that they hold themselves out also to transport consolidated loads of forwarder traffic at their present rates; and that the proposed operations, conducted at lower than existing rates, would enlarge the ability of forwarders to divert the most desirable LTL traffic. All carriers assert their willingness to negotiate suitable FAK rates; however, none has handled any of the involved traffic, and although Consolidated and T.I.M.E. do publish FAK rates between certain of the points involved, it was conceded that such rates have moved no freight forwarder traffic.

The Conference takes the position that freight forwarders serve a useful public purpose only when they utilize the railroads as underlying transportation, thus permitting the latter to participate indirectly in the transportation of LTL freight. To the extent they utilize motor carriage, however, they are in direct competition with existing motor common carriers of general freight, which, unlike the forwarders cannot be selective in the traffic they handle and must provide service at rural communities. In order to preserve an effective and healthy motor common carrier service, applications of this sort should be granted only when the applicants demonstrate their ability to provide a total service which is either of a better quality or less expensive than that of the carriers with which they compete. Neither of these conditions has been shown on this record.

DISCUSSION AND CONCLUSIONS

In support of their basic contention that *Armellini Express Lines, Inc., Ext.—F. F. Traffic, supra,* and *Sullivan Lines, Inc., Extension—Far West, supra,* should be overruled, protestants and the Conference have devoted much of their efforts to a generalized attack upon the status of freight forwarders as common carriers under the Interstate Commerce Act, and their role in the transportation system. They are characterized as "supernumeraries" of transportation serving no useful public purpose, whose participation in domestic LTL freight in competition with regular-route, motor common carriers of general freight can only lead to a deterioration and weakening of the latter with no corresponding public benefit. We comprehend the issues in this proceeding to be much more limited, and we do not intend to justify the existence of the freight forwarding industry. The role of that industry was recently exhaustively considered in *Investigation Into Status of Freight Forwarders,* 339 I.C.C. 711 (1971). Suffice it to say that freight forwarders are recognized

as common carriers by the act. See section 402(a)(5) of the act. They provide for the assembly, consolidation, break bulk and delivery of LTL freight, and hold out in their own name and under their own responsibility, a through transportation service from point of receipt to final destination. They must obtain appropriate authority from this Commission under standards of proof similar to those governing the issuance of motor carrier authorities, and, having obtained such authority, must observe the common carrier's obligation to render a reasonably continuous and adequate service within the scope of their permits or face revocation thereof. *Acme Fast Freight, Inc.*, v. *Inter State Exp., Inc.*, 298 I.C.C. 774 (1956); and *ABC Freight Forwarding Corp., Extension—Nationwide*, 303 I.C.C. 149 (1957). Under section 403 of the act, they are subject to tariff provisions analogous to those affecting motor common carriers, including the requirement that their rates be just and reasonable, and the prohibition against the giving of undue preference or advantage, and by virtue of section 421(g) of the statute are made subject to the provisions of the Elkins Act of February 19, 1903, 49 U.S.C. 41 *et seq.*, relative to rebates, concessions, and other discriminatory practices.[5] It is true that in recent years, the industry's share of the transportation market has remained static. Nevertheless, in 1972, class A freight forwarders (those with annual revenues of $100,000 or more) transported over 14.1 million shipments aggregating over 4.2 million tons of LTL freight,

[5] The claim of the Conference that freight forwarders are legally free to discriminate against smaller communities is, we think, somewhat overstated. This Commission's holding in *Eastern Central M. Carriers Assn.*, v. *ABC Freight*, 300 I.C.C. 733 (1957), that freight forwarders are not subject to section 4(1) of the act, (the "long-and-short-haul clause") simply recognizes that freight forwarders may enjoy a certain flexibility in setting rate levels to meet competition under circumstances which would be prima facie unreasonable in the case of the motor common carrier. It does not confer carte blanche upon freight forwarders to pick and choose their traffic, or to discriminate against particular shippers or regions.

and representing 4.4 percent of the small shipments traffic.[6] In short, freight forwarders are common carriers in every sense of the word, and there is nothing in the act, its legislative history, or this Commission's or any court decisions to suggest that they have outlived their usefulness, or that as a matter of policy they should be relegated to activities not in direct competition with other modes.

Freight forwarders, however, are prohibited from using their own equipment outside their terminal areas, cannot be a party to joint rates, and must, therefore, depend upon regulated carriers, not only for the physical transportation of their freight, but for the maintenance of truckload or carload rates which will enable them to compete at a profit and to avoid the necessity of segregating their freight by commodity. However, as carriers of LTL freight, they are often in direct competition with that segment of the motor carrier industry best suited in terms of authority and experience to serve them, namely, the regular-route motor common carriers of general freight. It is unrealistic to assume that the latter will readily accede to the forwarders' requests for lower rates, unless they are willing to forego the traffic or deem freight forwarder participation otherwise to be in their interests. Historically, the principal means of transportation utilized by the forwarders between concentration and break-bulk points understandably has been rail TOFC, and motor carrier service under local cartage agreements or section 409 contracts.[7] Investigation into *Status of Freight Forwarders, supra.*

[6] *Transport Economics*, Bureau of Economics, Interstate Commerce Commission, Volume I, No. 3-1974.

[7] Section 409 of the act generally permits forwarders and motor carriers subject to part II of the act to enter into contracts, not subject to tariff publication, for assembly and distribution services, and for transportation between concentration and break-bulk points not exceeding 450 miles in the case of truckload lots and without limitation in the case of LTL traffic.

In *Armellini Express Lines, Inc., Ext.—F. F. Traffic, supra*, this Commission recognized the freight forwarders need for motor carrier service under suitable FAK rates by holding that where existing carriers have provided only token solicitation under rates, which although possibly not exorbitant, are too high and structurally ill-suited to move the supporting forwarders traffic, their lack of interest is tantamount to an embargo justifying the grant of additional motor carrier authority. In so doing, it not only rejected the claim of the opposing general commodities carriers that if the supporting forwarder wished to use their service, it must raise its own rates, but considered protestants' repeated assertion of that claim as evidence of their lack of interest in the traffic. The principles set forth in that case represent no radical departure from established concepts of public convenience and necessity. Freight forwarders have long been considered proper parties to support an application for motor carrier authority, *Central Forwarding Inc., Ext.—Household Goods*, 107 M.C.C. 706 (1968); *Dobbert Common Carrier Application*, 73 M.C.C. 711 (1957); and *Eagle Motor Lines, Inc., Extension—Decatur*, 82 M.C.C. 183 (1960); and an embargo has long been a recognized exception to the principle that the level of rates is not a proper subject for consideration in motor carrier application proceedings, *National Freight, Inc., Ext.—Pittsburgh, Pa.*, 110 M.C.C. 433 (1969); *Porter Transp. Co. Common Carrier Application*, 74 M.C.C. 675 (1958); and *H. L. & F. McBride Extension—Ohio*, 62 M.C.C. 779 (1954). That freight forwarders enjoy no special presumptions in their favor in such proceedings is also clear. Compare *Sullivan Lines, Inc., Extension—Far West, supra*, and *Curtis, Inc., Extension—Acme to Denver*, 121 M.C.C. 15 (1975), in which the supporting forwarders claims of embargo were rejected, although the former application was granted on other grounds. We believe that the principles set forth in *Armellini* represent

sound regulatory policy and see no reason to reconsider them at this time.

Applying the foregoing to the facts of the instant case, we believe it to be clear that the protestants have refused to make any meaningful effort to negotiate suitable FAK rates with the supporting forwarders and have, thereby, demonstrated their lack of interest in the involved traffic. The supporting forwarders corresponded with each of the protestants herein as well as with 21 other motor carriers not parties to these proceedings, to no avail. T.I.M.E. stated flatly that it needed to retain present rate levels and would not consider an adjustment at this time. Transcon, at the time of the hearing, and after receiving four letters from the forwarders, was still requesting further information. Consolidated failed to respond. In no case did any of the protestants solicit or personally contact the forwarders, even though Transcon, at least, was specifically requested to do so. Moreover, protestants have (a) consistently opposed similar applications supported by freight forwarders including *Curtis Ext. Acme to Denver, supra* (all three) and *Sullivan Lines Extension—Far West, supra* (T.I.M.E. and Transcon); (b) despite their token protestations of willingness to negotiate, protestants have steadfastly maintained throughout these proceedings that they are under no obligation to accommodate their competitors, are interested in the involved traffic only as their own freight, and that if the supporting forwarders wish to utilize their services, they must take the rate structure as they find it; and (c) while protestants maintain FAK rates to some of the points here involved, the level thereof is too high, and such rates have concedely never moved a pound of forwarder traffic. It is true that the forwarders did not initiate correspondence with protestants until shortly before the applications were filed. However, in view of protestants' manifest unwillingness to serve supporting forwarders except under conditions impossible for the latter to accept, we do not believe that the forwarders

can be accused of bad faith. Indeed, the evidence would tend to suggest the contrary conclusion that the protestants' responses to the forwarders' requests, when forthcoming, were made with an eye toward the hearing.

However, even if an embargo had not been established, we believe that a grant of authority is warranted on grounds of inadequate existing service. Rail TOFC service has been demonstrated to be slow and erratic, and we disagree with the Administrative Law Judge that transit times of 5 to 11 days are adequate, particularly when the forwarders' trailers are delivered to and picked up from the TOFC ramps in a sealed condition and no terminal operations are involved. Joint-line motor carrier service is likewise slow and erratic, and it is significant that no rail carrier and only three motor common carriers oppose the application. As to the protestants, (a) none serves New Orleans, (b) none has solicited or handled any of the supporting forwarders traffic, and (c) none indicated except in the most general terms, the nature, frequency, and quality of service it would provide. The record is silent upon such matters as how much and how often equipment would be available for the supporting forwarders use, whether and under what conditions protective service is offered, and what transit times could be expected between the involved points. The lack of such information is, of course, consistent with protestants' general position that the supporting forwarders are competitors and not desirable potential customers. The situation here is easily distinguished from that in *Curtis Ext.—Acme to Denver, supra*, where the supporting forwarders were found to be relatively satisfied with existing service, were concerned solely with the level of rates, and the application was opposed by at least one carrier experienced in the handling of domestic freight forwarder traffic and interested in negotiating suitable rates.

Applicants, on the other hand, operate suitable equipment, and are in a position to provide the type of service and publish FAK rates of a level that shippers can afford, as evidenced by the fact that Shanno presently renders a similar service from five eastern points to St. Paul, and has participated in the traffic on a trip-lease basis for 13 years. In this regard, we do not consider it important that the actual level of rates has not yet been negotiated and that as a consequence, applicants were unable to demonstrate with absolute precision, their anticipated level of profits. Any tariff ultimately adopted will obviously have to reflect current economic conditions, and not those that prevailed at the time of the hearing, and we need only add that inasmuch as the authority to be granted herein will be restricted to the transportation of traffic moving from the facilities of and under the bills of lading of the supporting forwarders, no carrier will be adversely affected if the operations prove to be a failure.

FINDINGS

In both proceedings, we find that the public convenience and necessity require operation by each applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities (except classes A and B explosives, commodities of unusual value, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment and foodstuffs), (1) from Boston, Mass., Newark, N.J., New York, N.Y., and Philadelphia, Pa., to Kansas City, Mo., Dallas and Houston, Tex., and New Orleans, La.; and (2) from Springfield, Mass., to Kansas City, Mo., and Dallas and Houston, Tex., restricted to shipments originating at or destined to the facilities of ABC Freight Forwarding Corp., Midland Forwarding Corp., and National Carloading Corp., and further restricted to shipments moving on bills of lading issued by the named freight forwarders; that applicants

are fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that certificates authorizing such operations should be granted.

Upon compliance by applicants with the requirements of sections 215, 217, and 221(c) of the act and with the Commission's rules and regulations thereunder, within the time specified in the order entered concurrently herein, appropriate certificates will be issued. An appropriate order will be entered.

COMMISSIONER CLAPP did not participate.

APPENDIX

Total combined ABC, Midland, National Tonnage (in pounds) moving from and to involved application points in 1972, first 9 months 1973, projected 1973

From	To			
	Kansas City, Mo.	Dallas, Tex.	Houston, Tex.	New Orleans, La.
For the Year of 1972:				
Boston, Mass	635,169	3,709,534	2,839,331	1,422,744
Springfield, Mass.	6,905	594,927	315,919	[2]
Newark, N.J.	1,003,406	3,645,376	1,695,163	1,215,144
New York, N.Y.	[1]4,383,480	[1]6,598,745	3,989,000	[1]4,766,727
Philadelphia, Pa.	539,690	1,361,511	912,889	821,958
Total	6,568,650	15,910,093	9,752,302	8,226,573
Grand total to all involved destinations: 40,457,618				
For the first 9 months of 1973:				
Boston, Mass.	317,359	2,740,818	2,171,838	817,113
Springfield, Mass.	21,412	1,181,433	371,450	[2]
Newark, N.J.	839,570	3,765,651	1,805,213	955,021
New York, N.Y.	[1]3,028,400	[1]5,928,087	[1]3,086,658	3,389,825
Philadelphia, Pa.	390,098	1,335,163	774,454	703,236
Nine months total	4,596,839	14,951,152	8,209,613	5,865,195
1973 projected total	6,129,116	19,934,869	10,946,149	7,820,259
1973 projected grand total to all involved destinations: 44,830,393				

[1] Includes North Haven, Conn., traffic which will move from New York, N.Y., in stopoff service in the future, as will also be the case with Springfield traffic to the extent needed. See Ex. 7 and Tr. 142.

[2] No authority requested from Springfield to New Orleans.

Note: Sept.-Nov. of each year represents supporters' heaviest traffic period (Tr. 199), and Oct. and Nov. increases are excluded from the 1973 projections. National Carloading was acquired in July, 1972 (Ex. 4, p. 3), causing the traffic increase in '73 over '72 (Tr. 198).

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 30th day of October 1975.

No. MC-30844 (Sub-No. 462)

KROBLIN REFRIGERATED XPRESS, INC., EXTENSION—FREIGHT FORWARDER TRAFFIC

No. MC-134477 (Sub-No. 30)

SCHANNO TRANSPORTATION, INC., EXTENSION—FREIGHT FORWARDER TRAFFIC

Investigation of the matters and things involved in this proceeding having been made, and Division 1, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That unless compliance is made by the respective applicants with the requirements of 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report to that applicant shall be considered as null and void and the application of the noncomplying applicant shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1.

ROBERT L. OSWALD,
Secretary.

[SEAL]

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE TRANSPORTATION OF FREIGHT FORWARDER TRAFFIC ISSUED SUBSEQUENT TO THE ARMELLINI DECISION

1. Midwest Haulers, Inc., No. MC-13900 (Sub-No. 16), served December 18, 1973—unreported
2. Midwest Haulers, Inc., No. MC-13900 (Sub-No. 17), served June 21, 1974—unreported
3. Schanno Transportation, Inc., No. MC-134477 (Sub-No. 21), served February 28, 1975—unreported
4. Midwest Haulers, Inc., No. MC-13900 (Sub-No. 21), served March 3, 1975—unreported
5. Kroblin Refrigerated Xpress, Inc., No. MC-30844 (Sub-No. 462), served November 6, 1975—reported, Kroblin Refrigerated Xpress, Inc., Extension—Freight Forwarder Traffic, 123 M.C.C. 831 (1975)
6. Schanno Transportation, Inc., No. MC-134477 (Sub-No. 30), served November 6, 1975—reported, Schanno Transportation, Inc., Extension—Freight Forwarder Traffic, 123 M.C.C. 831 (1975)
7. Midwest Haulers, Inc., No. MC-13900 (Sub-No. 26), served November 24, 1975—unreported
8. Schanno Transportation, Inc., No. MC-134477 (Sub-No. 75), served January 28, 1976—unreported
9. Curtis, Inc., No. MC-113678 (Sub-No. 533), served February 19, 1976—hold open pending fitness determination in Curtis, Inc., No. MC-113678 (Sub-No. 557), pursuant to Division 1 Order served December 10, 1976—unreported
10. Midwest Haulers, Inc., No. MC-13900 (Sub-No. 19), served April 12, 1976—reported, Midwest Haulers, Inc., Extension—Virginia Points, 124 M.C.C. 470 (1976)

11. Sullivan Lines, Inc., No. MC-47109 (Sub-No. 7), served September 6, 1976—reported Sullivan Lines, Inc., Extension—Far West, 118 M.C.C. 801 (1973)

12. Skyline Transport, Inc., No. MC-142142 (Sub-No. 2), served April 5, 1977—unreported

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77–134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
KROBLIN REFRIGERATED XPRESS, INC.,
and
SCHANNO TRANSPORTATION, INC.

Respondents.

BRIEF OF RESPONDENT KROBLIN REFRIGERATED XPRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF OF RESPONDENT
KROBLIN REFRIGERATED XPRESS, INC.
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

QUESTION PRESENTED

Whether evidence presented by freight forwarders in support of motor carrier applications suffices to establish "public convenience and necessity" as

required by Section 207 of the Interstate Commerce Act [49 U.S.C. §307]?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited in the petition, the provisions in the Appendix herein also are relevant to this case.

STATEMENT OF THE CASE

The case below involved review of the decision by the Interstate Commerce Commission in Kroblin Refrigerated Xpress, Inc., Extension--Freight Forwarder Traffic, 123 M.C.C. 831, decided October 30, 1975 [Petition, pp. 10a-30a]. The Commission's report also embraced the application of Schanno Transportation, Inc., Extension--Freight Forwarder Traffic.

The Commission found public convenience and necessity to require operation by each motor carrier applicant. The

applications were supported by three freight forwarders and restricted to traffic moving on the forwarders' bills of lading, from and to the forwarders' facilities.

In addition to finding an inadequacy of existing service [Petition, p. 26a], the Commission also considered and found that the supporting freight forwarders were in need of access to reasonable line-haul rates for aggregate less-than-truck-load quantities of miscellaneous freight [Petition, p. 18a].

The Court below found not only substantial evidence in support of the findings of fact of the Interstate Commerce Commission [Petition, p. 8a] but also was in agreement with the conclusions of law "concerning the position of freight forwarders in the national transportation scheme" as found in Alterman Transport

Lines, Inc. v. United States, 361 F.Supp. 664 (M.D. Fla. 1973) [Petition, p. 9a].

Freight forwarders were shown to enjoy no special presumptions in their favor and to be proper parties to support an application for motor carrier authority [Petition, p. 24a]. Reference also was made to a line of cases back to 1954 in which the level of rates of motor carriers were considered to be so high as to constitute an embargo on traffic and to warrant and justify grants of motor carrier authority [Petition, p. 24a].

The Court below sustained the Commission's decision [Petition, pp. 3a-9a], holding that:

> "...we do not have to decide whether freight forwarders' support will alone suffice to uphold a carrier's application for certificate authority, because in this case the Commission paid careful attention to the inadequacy of service currently available to shippers over the routes applied for. The Commission also found, with substantial evidence, that 'the protestants [petitioners here] have refused to make any meaningful effort to negotiate suitable FAK rates with the supporting forwarders and have, thereby, demonstrated their lack of interest in the involved traffic.'" [Petition, p. 8a].

ARGUMENT

The question presented by petitioner is neither a substantial federal question nor a justiciable issue.

A. No Substantial Federal Issue

Freight forwarders are required by the statute [49 U.S.C. 1002(a)(5)] to use the underlying services of regulated motor common carriers, among other specified carriers, for terminal-to-terminal operations and forbidden by statute [49 U.S.C. 1018] from using other than those specified instrumentalities for the performance of such transportation between consolidation and break-bulk (terminal-

to-terminal) points [Appendix, p. 2a].

The concept of granting a certificate of public convenience and necessity to a motor carrier restricted to general commodity traffic moving on bills of lading of freight forwarders is not new. Cf. Globe Cartage Company, Inc., Common Carrier Application, 42 M.C.C. 547 (1943); aff'd, U.S. et al v. Hancock Truck Lines, Inc. 342 U.S. 774, 65 S.Ct. 1003, 89 L.Ed. 1357 (1945). Moreover, as shown, the Commission long has granted additional motor carrier authority when it finds the rates of existing carriers so high as to constitute an embargo [Petition, p. 24a].

Petitioner sought to submerge findings of inadequacy of service under those other findings pertaining to need for access to reasonable line-haul rates covering aggregate less-than-truckload quantities of miscellaneous freight [FAK rates]. As

the Court below found, the challenged decision does not rest upon the proposition of a need for freight forwarders to obtain rates low enough to allow them a reasonable profit. It rests on explicit findings of inadequacy of existing service as shown by the Court's recitation of the Commission's findings of the deficiencies in existing service [Petition, p. 8a].

B. The Question Presented Is Not Justiciable

Petitioner's question in the Court below was whether the Commission erred in issuing certificates of public convenience and necessity when the only evidence in support of the applications for such certificates consisted of proof that the services so authorized were needed by certain regulated freight forwarders. Petitioner's question herein is whether regulated motor carriers

are obligated to favor regulated freight forwarders with long-haul transportation service at rates low enough to enable forwarders to make a profit.

Petitioner sought below a review of the role of freight forwarders. The Court was cognizant of provisions committed to the Commission's authority by the Congress' defining the "public interest" role of freight forwarders and requiring the Commission to provide for the continuance of coordinated freight forwarder-motor carrier service [Petition, pp. 7a-8a].

Petitioner now poses before this Court a rhetorical question with an obvious answer implied. Use of the value term "favor" defines the answer sought.--It seeks to elicit a direct answer in support of petitioner's view. It is

neither a sound nor just question.

CONCLUSION

The granting of the two applications did not constitute a change from precedent or long-standing policy. Such action represented a settled course of action which embodied the Commission's informed judgment that, by granting those applications, it was carrying out a policy committed to it by the Congress.

Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

By: Thomas R. Kingsley
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DATED: AUGUST 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of August 1977 served three copies each of the foregoing brief of respondent in opposition to the petition for writ of certiorari upon all parties, including counsel for petitioner and the Solicitor General, by mailing copies thereof to each such party via first class mail, postage prepaid.

Thomas R. Kingsley

Thomas R. Kingsley

APPENDIX

APPENDIX

Statutory Provisions:

Section 409 [May 16, 1942, amended November 12, 1943; May 16, 1945, February 20, 1946, December 20, 1950.] [49 U.S.C. §1009.] Utilization by Freight Forwarders of Services of Common Carriers by Motor Vehicle.

(a) Nothing in this Act shall be construed to prevent freight forwarders subject to this part from entering into or continuing to operate under contracts with common carriers by motor vehicle subject to part II of this Act, governing the utilization by such freight forwarders of the services and instrumentalities of such common carriers by motor vehicle and the compensation to be paid therefor: Provided, That in the case of such contracts it shall be the duty of the parties thereto to establish just, reasonable, and equitable terms, conditions, and compensation which shall not unduly prefer or prejudice any of such participants or any other freight forwarder and shall be consistent with the national transportation policy declared in this Act: And provided further, That in the case of line-haul transportation between concentration points and break-bulk points in truckload lots where such line-haul transportation is for a total distance of four hundred and fifty highway-miles or more, such contracts shall not permit payment to common carriers by motor vehicle of compensation which is lower than would be received under rates or charges established under part II of this Act.

Section 418 [May 16, 1942, July 12, 1960.] [49 U.S.C. §1018.] Carriers the Services of Which Freight Forwarders May Utilize.

It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities of services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; express companies subject to this Act; air carriers subject to the Civil Aeronautics ct of 1938, as amended; common carriers by motor vehicle engaged in transportation exempted under the provisions of Section 203(b)(7a) of this Act; common carriers by motor vehicle exempted under the provisions of Section 204(a)(4a) of this Act; common carriers by water engaged in transportation exempted under the provisions of Section 303(b) of this Act; the Alaska railroad; common carriers by water operating between Alaskan ports, and between those ports and other ports in the United States or common carriers by water operating between Hawaiian ports, and between those ports and other ports in the United States.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

KROBLIN REFRIGERATED XPRESS, INC.

and

SCHANNO TRANSPORTATION, INC.
Intervenors.

BRIEF IN OPPOSITION OF INTERVENOR SCHANNO TRANSPORTATION, INC.

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Transportation, Inc.

IN THE
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and

SCHANNO TRANSPORTATION, INC.
Intervenors.

BRIEF IN OPPOSITION OF INTERVENOR
SCHANNO TRANSPORTATION, INC.

Intervening respondent Schanno Transportation, Inc. prays that the Petition for a Writ of Certiorari be denied.

QUESTION PRESENTED

Is the Interstate Commerce Commission's

finding that intervenors' services are required by the public convenience and necessity supported by adequate findings, substantial evidence, and based upon a rational exercise of its statutory power and all relevant factors?

STATEMENT OF THE CASE

Except to the extent indicated otherwise herein, intervenor Schanno concurs in petitioner's Statement.

The boiled-down basis for the Commission's certificate issuance to intervenors is twofold: (1) existing motor carriers have embargoed supporting forwarders' traffic, and (2) existing service is inadequate to meet the needs of supporting forwarders (Appendix, pp. 25a, 26a). The latter, coupled with the proposed service advantages of intervenors which are designed to meet supporting forwarders' needs, resulted in the Commission's ultimate finding of public convenience and necessity.

Petitioner sought review of the Commission's decision in the Court below on one asserted ground only, which is not ostensibly pursued herein:

> "Did the Interstate Commerce Commission err in issuing certificates . . . when the only evidence submitted in support of the applications for such certificates consisted of proof that the services

> so authorized were needed by certain regulated forwarders?" (Pet. Br. to U.S. Ct. App. D.C., pp. 1-2)

The Court of Appeals affirmed the Commission's decision in all respects, stating that the issues presented to the Commission involved "a combination of service and suitable rates" (Appendix, p. 5a). The Court found that forwarders were proper application supporters (Appendix, pp. 7a-8a).

ARGUMENT

Neither the decision below nor the Commission's decision <u>requires</u> any carrier to maintain special rates for Part IV carriers. Instead the Commission found that supporting forwarders needed FAK (freight-all-kinds) rates because they permit more efficient and expeditious forwarder service - such rates eliminate the necessity of rating and classifying the multitude of commodities supporting forwarders ship. Existing carriers' rate <u>structure</u> generally does not afford these advantages and their rate <u>level</u> is also seriously deficient since supporting forwarders could not use such and operate profitably. Supporting forwarders contacted over twenty existing motor carriers in an effort to secure the rate level and structure needed but to no avail (Appendix, pp. 8a, 9a, 25a, 26a). Thus, existing carriers are not interested in moving the traffic of forwarders, but instead, since petitioner's members

view forwarders as competitors, they desire to capture such traffic at existing motor carrier rates. Existing motor carriers want to deny the proposed service to forwarders in order to: (1) force the forwarders to take a loss while moving traffic via another mode, which they must by law, so that forwarders are ultimately driven out of business and existing motor carriers would then capture such traffic, or (2) force the forwarders to raise their rates, and thus compel small-shipment forwarder customers to pay a higher transportation charge, at least equal to motor carrier less-truckload rates, thereby improving motor carriers' competitive position. The Commission properly rejected such strategy and recognized this plan for what it was, i.e., an embargo. For years, the Commission has recognized, as here, that where an opponent maintained rates which were so high as to serve as a clear indication that disinterest was shown in particular traffic, and such opponent refused to negotiate and consider publishing lower rates, then an embargo was present and application approval was warranted under 49 U.S.C. §307. National Freight, Inc. Ext., 110 M.C.C. 433, 434-35 (1969); J.E.M. Transp. Co. Ext., 94 M.C.C. 573, 576-77 (1964); Edwards Ext., 88 M.C.C. 318 (1961); Ewell Ext., 72 M.C.C. 645 (1957); United Parcel Service Com. Carr. Appl., 68 M.C.C. 199, 203-04 (1956); McBride Ext., 62 M.C. C. 779 (1954), among others. Thus, forwarders' needs in this regard, and existing carriers' refusal to fulfill such, in

the circumstances cited, resulted in one basis for the Commission's ruling.

The Court below properly affirmed the Commission's rationale concerning this basis for approval. It is well established that the factor of rates may be considered in a case of the instant type when a supporter, which has been using one mode (rail), seeks to obtain the benefits of another mode (motor). Schaffer Transportation Co. v. United States, 355 U.S. 83, 89, 92 (1957); see also ICC v. J-T Transport, 368 U.S. 81, 91-93 (1961). A supporter cannot be denied the benefits of the second mode offering lower rates even if other carriers will lose traffic. Schaffer Transportation Co. v. United States, supra at 91-92. The same principles apply here a fortiori since opponents have not even proven that they will lose any traffic previously handled by them (Appendix, pp. 20a, 25a). Furthermore, it has been previously ruled that the Commission has broad discretion under 49 U.S.C. §307 in determining whether the public convenience and necessity warrant the requested certification. Schaffer Transportation v. United States, supra at 88; ICC v. Parker, 326 U.S. 60, 65 (1945); cf., United States v. Detroit & Co. Nav. Co., 326 U.S. 236, 241 (1945); United States v. Pierce Auto Frt. Lines, 327 U.S. 513, 531-32 (1946). In fact, there is a presumption that the Commission has performed its official duties properly. ICC v. Jersey City, 322 U.S. 503, 512 (1944). In sum, whether the existing

motor carrier rate structure and level, in the instant circumstances, should have been a factor in the issuance of certificates to intervenors is clearly a matter within the discretionary expertise of the Commission, which has been soundly exercised here.

Secondly, and contrary to petitioner's contention (p. 7), the Commission found, and the Court below affirmed (Appendix, p. 8a), that, aside from the embargo issue, "a grant of authority is warranted on grounds of inadequate existing service" (Appendix, p. 26a), which finding is not contested herein and was not questioned in the Court below. This finding of inadequacy alone, coupled with the other relevant favorably 49 U.S.C. §307 findings made and not contested, is enough to warrant certificate issuance - in fact, compliance with a lesser burden is sufficient. Schaffer Transportation v. United States, supra at 90; Davidson Transfer & Storage Co. v. United States, 42 F. Supp. 215, 219, 220 (E.D. Pa.), aff'd 317 U.S. 587; Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D. N.H., 1964); Lemmon Transport Co. v. United States, 393 F. Supp. 838, 842 (W.D. Va., 1975); Yellow Forwarding Co. v. United States, 369 F. Supp. 1040, 1045 (D. Kans., 1973); Feature Film Service v. United States, 347 F. Supp. 191, 201-02 (S.D. Ind., 1972); Younger Bros. v. United States, 289 F. Supp. 545, 547-48 (S.D. Tex., 1968). Since this aspect of the Commission's decision, and the Court's affirmance

thereof, is enough in and of itself to justify certificate issuance, review is clearly unwarranted. Thus, the decision below is clearly correct without regard to the question sought to be reached by petitioner.

CONCLUSION

The decision below should not be reviewed since the question posed is unsubstantial, there is an absence of conflict in decisions, and the decision below is plainly correct. Accordingly, intervening respondent respectfully moves that the petition be denied.

Respectfully submitted,

Anthony C. Vance
Attorney for Respondent
Schanno Transportation, Inc.

Dated: August 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 1977, three copies of the Brief in Opposition of Intervenor Schanno Transportation, Inc. were mailed postage prepaid to: Robert C. Lawrence, Esq., Room 5109, Interstate Commerce Commission, Washington, D. C. 20423; Solicitor General, Department of Justice, Washington, D. C. 20530; Thomas R. Kingsley, Esq., Attorney for Intervenor Kroblin Refrigerated Xpress, Inc., 1819 H Street, N.W., Washington, D. C. 20006; Homer S. Carpenter, Esq., Rice, Carpenter and Carraway, 501 Perpetual Bldg., 1111 E Street, N.W., Washington, D. C. 20004; and Keith G. O'Brien, Esq., Attorney for Petitioner, 1616 P Street, N.W., Washington, D. C. 20036. I further certify that all parties required to be served have been served.

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No. 77-134

In the Supreme Court of the United States

OCTOBER TERM, 1977

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Kroblin Refrigerated Express, Inc., and Schanno Transportation, Inc., filed applications with the Interstate Commerce Commission for certificates of public convenience and necessity authorizing operation as common carriers by motor vehicle between the terminals and facilities of three "freight forwarders" as defined by 49 U.S.C. 1002 (a)(5).[1] Petitioner[2] protested the applications, urging

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[1]Freight forwarders are regulated under Part IV of the Interstate Commerce Act, as added, 56 Stat. 284-300, and amended, 49 U.S.C. 1001-1022. A freight forwarder has a common carrier's responsibility for the shipper's goods, which move on the freight forwarder's bill of lading. The freight forwarder provides assembly and consolidation of the shipper's property at its origin and break-bulk and distribution of the property at the destination, employing carriers subject to Parts I (rail), II (motor), or III (water) of the Interstate Commerce Act for the underlying transportation services. *Investigation into Status of Freight Forwarders*, 339 I.C.C. 711.

[2]Petitioner is a conference of motor carriers. None of the protesting individual motor carriers filed a petition for review of the

the Commission to overrule its earlier decisions holding that the needs of freight forwarders may be considered in determining the public convenience and necessity. The Commission, rejecting this contention, found that existing service between the forwarders' facilities was inadequate and that the proposed operations were required by the public convenience and necessity (Pet. App. 26a):

> [A] grant of authority is warranted on grounds of inadequate existing service. Rail TOFC [trailer-on-flatcar] service has been demonstrated to be slow and erratic, and we disagree with the Administrative Law Judge that transit times of 5 to 11 days are adequate, particularly when the forwarders' trailers are delivered to and picked up from the TOFC ramps in a sealed condition and no terminal operations are involved. Joint-line motor carrier service is likewise slow and erratic, and it is significant that no rail carrier and only three motor common carriers oppose the application. As to the protestants, (a) none serves New Orleans, (b) none has solicited or handled any of the supporting forwarders traffic, and (c) none indicated except in the most general terms, the nature, frequency, and quality of service it would provide. The record is silent upon such matters as how much and how often equipment would be available for the supporting forwarders use, whether and under what conditions protective service is offered, and what transit times could be expected between the involved points.

The Commission therefore granted the applications. The court of appeals affirmed (Pet. App. 3a-9a).

Commission's decision, nor did any intervene in the court of appeals' proceeding.

The decision below is correct and does not warrant review by this Court. Early in this century the Court held that, in their relation to carriers, freight forwarders have the status of shippers. *Interstate Commerce Commission* v. *Del., L. & W. R.R.*, 220 U.S. 235. In recognition of this status, the Commission long has considered the needs of freight forwarders in deciding motor carrier applications for operating authority. *Central Forwarding Inc., Extension—Household Goods*, 107 M.C.C. 706, 714, modified on other grounds, *sub nom. Joe M. Crocker, Common Carrier Application*, 110 M.C.C. 29; *Dobbert Common Carrier Application*, 73 M.C.C. 711, 714; cf. *Globe Cartage Company, Inc., Common Carrier Application*, 42 M.C.C. 547.

The rates charged for existing service are relevant in assessing forwarders' needs. *Armellini Express Lines, Inc., Extension—Freight Forwarder Traffic*, 113 M.C.C. 603, affirmed *sub nom. Alterman Transport Lines, Inc.* v. *United States*, 361 F. Supp. 664 (M.D. Fla.). But petitioner's contention that the court of appeals requires motor carriers to maintain special rates for freight forwarders (Pet. 2, 5) is incorrect. No such requirement was sought or imposed in this case. The Commission simply assessed the factors bearing upon the public interest in additional motor carriage, including the benefits of the applicants' proposed rates and service. Its decision thus "reflects the kind of judgment that is entrusted to it, a power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.' " *Bowman Transportation* v. *Arkansas—Best Freight System, Inc.*, 419 U.S. 281, 293. See also *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; cf. *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409. Since the

Commission considered all the relevant factors, its decision, contrary to petitioner's contention (Pet. 7), is supported by *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1977.

DOJ-1977-10